SABAH SHIPYARD SDN BHD & ANOR *a*

v.

PUBLIC LEASING & FACTORING SDN BHD & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: D2-24-23-1998]
18 AUGUST 1999

CIVIL PROCEDURE: *Injunction - Injunction to restrain party from continuing proceedings in foreign jurisdiction - Proceedings in respect of same subject matter in Ecuadorian court - Whether there was genuine need to bring proceedings in Ecuador - Whether proceedings in Ecuador vexatious or oppressive - Whether Malaysian court natural forum for determination of issue* *c*

Sabah Shipyard Sdn Bhd ('Saship') had purchased one unit of combustion turbine ('the turbine') from Wing Tiek Holdings Bhd ('Wing Tiek') for RM49 million. It was common knowledge that the turbine was to be affixed to Victoria II, a power barge which Saship had contracted to construct and sell to a third party. The purchase was a credit purchase as Saship only paid Wing Tiek RM29 million. Be that as it may, on 3 August 1996, Saship entered into an agreement ('the Agreement') with the third intervenors ('BSNC'), and by that, took the turbine on hire-purchase from BSNC for RM22,222,944 payable in 24 equal instalments. Thereafter, a sum of RM20 million was paid by BSNC to Wing Tiek. *d* *e*

Saship defaulted in the payments under the Agreement and BSNC applied for an order to repossess the turbine. The learned judge ruled that the Agreement was a loan agreement for RM20 million, and not a hire-purchase agreement, and BSNC therefore could not repossess the turbine. In the meanwhile, by an agreement dated 21 July 1998, Saship sold Victoria II to Starwater Ltd ('Starwater'). Starwater, in turn, executed a bareboat charter of Victoria II with Energycorp Compania Generadorra de Energia S.A. ('Energycorp'), a company in Ecuador which needed Victoria II for the supply of power to the Government of Ecuador. *f* *g*

The facts also showed that on 28 December 1998, when BSNC's application for the order of repossession came up for hearing, Victoria II with the turbine affixed was already on its way to Ecuador. BSNC applied for an order that Victoria II be brought back within the jurisdiction of the Malaysian court, but the application was refused. In the circumstances, whilst its application for possession of the turbine was still pending in Malaysian court, BSNC petitioned to the court in Ecuador and obtained an order against Energycorp *h* *i*

for the arrest of the turbine. Essentially, the arrest was to prevent the turbine from leaving Ecuadorian jurisdiction pending hearing in Ecuadorian court of BSNC's claim to the title and ownership of the turbine. Saship applied to the High Court in Malaysia for an order to injunct BSNC from continuing with the Ecuadorian proceedings on the grounds of: (i) duplicity of proceedings; and (ii) *res judicata.*

Held:

[1] BSNC's concern was to get physical possession of the turbine and had to seek the determination of the court in Ecuador where the turbine was and is. Also, they had to begin by having the turbine arrested so that it would remain within the jurisdiction of the country where the question was to be decided. *Prima facie*, therefore, BSNC had genuine need to bring the proceedings in Ecuador.

[2] The Malaysian court, which is the natural forum for the determination of the question of ownership of the turbine, should only restrain BSNC from pursuing proceedings in Ecuador if such pursuit is vexatious or oppressive. In considering whether BSNC's action was vexatious or oppressive, a balancing of the advantage to BSNC and the disadvantage to Saship is required.

[3] BSNC had genuine need to bring proceedings in Ecuador and it was advantageous to them to do so. On the other hand, inconvenience to Saship is not a valid consideration, and neither is the fact that the same question will be decided by the courts of two different countries. That being the case, the Ecuadorian proceedings are not vexatious or oppressive or have not been shown to be so.

[4] As for the fact that the question of ownership of the turbine has already been decided by the High Court in Malaysia in favour of Saship, that is not properly to be used to restrain BSNC from continuing with the proceedings in Ecuador. If at all, it is a matter for Saship to bring for the consideration of the Ecuadorian court.

[Application dismissed.]

Case(s) referred to:

Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors [1996] 5 MLJ 389 ***(refd)***

JH Rayner (Mincing Lane) Ltd v. Manilal & Sons (M) Sdn Bhd & Anor [1988] 1 CLJ 620 ***(refd)***

Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak & Ors [1987] 2 MLJ 397 ***(foll)***

The Atlantic Star [1975] 2 All ER 175 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 176(10)

For the applicants - William Leong (Lee Kuan Leong & P Guna with him); M/s Kadir, Tan & Ramli

For the 3rd intervenors - N Chandran (S Ramesh with him); M/s Adnan Sundra & Low

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad J:

On 21 December 1998, faced with a restraining order that I had made in favour of the first applicants ("Saship") and the second applicants under s. 176(10) of the Companies Act 1965, the third intervenors ("BSNC") filed an application (encl. (101)) for orders, *inter alia,* giving them liberty to take possession of a turbine from Saship and, in the meantime, restraining Saship from removing the turbine. BSNC claimed to be the owner of the turbine who had hired it to Saship under a hire-purchase agreement dated 3 August 1996 which Saship had breached by defaulting in payment. The turbine had become a component of a power-barge named Victoria II which Saship had built and which, according to Saship, was then subject to an agreement dated 21 July 1998 for its sale by Saship to a company called Starweaver Ltd. ("Starweaver"), who had entered into a bareboat charter of the power-barge for two years with a company called Energycorp Companie Generadorra de Energia S.A. ("Energycorp"), an Ecuadorian company, who needed the services of the power-barge for the supply of power to the Government of Ecuador. To BSNC, it was an urgent application because they had information that the power-barge was about to leave Saship's shipyard in Labuan.

When BSNC's application came up for hearing on 28 December 1998, it transpired that Victoria II was already on its way to Ecuador. The hearing could not proceed because Saship needed time to file an affidavit in reply. BSNC, on the other hand, had urgent need for an order that the turbine – meaning, effectively, Victoria II – be brought back. I ordered that BSNC file

a separate application for that purpose, which they did on 29 December 1998 (encl. (106)) and which I dismissed on 31 December 1998. So Victoria II continued on its way to Ecuador with the turbine.

Saship had given an undertaking that they would not pass title in Victoria II to Starweaver until BSNC had been paid in full sums due to them under the hire-purchase agreement.

The hearing proper of BSNC's application (encl. (101)) commenced only on 23 March 1999. The central question to be decided on the application was whether BSNC were the owner of the turbine, because if they were, then the hire-purchase agreement was truly a hire-purchase agreement and BSNC would have the right to repossess the turbine, but if they were not, then the hire-purchase agreement was a cloak for a loan transaction and BSNC would not have the right to repossess the turbine. The hearing was continued on 15 May 1999 and 21 May 1999.

In the meantime, BSNC, on 20 April 1999, had commenced proceedings in Ecuador in respect of the turbine. So on 30 April 1999 Saship filed the present application for an injunction to restrain BSNC from going ahead with the proceedings that they had commenced in Ecuador or from commencing other proceedings in Ecuador or in any other country relating to the taking possession of the turbine or concerning the hire-purchase agreement of 3 August 1996.

On 21 May 1999 I dismissed BSNC's application, finding, *inter alia*, that BSNC were not the owner of the turbine. The decision is under appeal.

The nature of the proceedings that BSNC commenced in Ecuador may be understood from a letter dated 3 May 1999 written by BSNC's solicitors in Ecuador to BSNC's solicitors in Kuala Lumpur. In those proceedings BSNC, relying on the hire-purchase agreement, claim title and ownership in the turbine against Energycorp, who, it was said, had, in the power-purchase agreement with the Government of Ecuador, claimed that the turbine was their property. A petition to obtain an arrest order in respect of the turbine was filed on 20 April 1999 and the arrest was effected on 27 April. The purpose of the arrest was to prevent the turbine from leaving Ecuadorian jurisdiction pending hearing on its merits of BSNC's claim, which had to be filed by 13 May 1999 and which, therefore, may have now been filed. The operation of the turbine was not disturbed by the arrest. In the claim on the merits, the court in Ecuador will be asked to determine whose property is the turbine.

As, to abide by their undertaking, Saship would not, for the moment, be passing title in the turbine to Starweaver, it is obviously important to them to come in as a party in the proceedings in Ecuador to dispute BSNC's claim to ownership of the turbine, because should the court in Ecuador decide that BSNC are the owner of the turbine, the decision would have an adverse effect on the sale and purchase agreement between Saship and Starweaver. Saship would have to defend their agreement with Starweaver, and I think it would not seem right for them to sit back and allow the proceedings in Ecuador to proceed without their intervention. I respectfully disagree with BSNC's contention that Saship have no more interest in the turbine or the power-barge.

The effect on Saship of BSNC's bringing the proceedings in Ecuador is that, at the instance of BSNC, Saship were confronted with the need to defend two proceedings, one in Malaysia and another in Ecuador, which called for a determination of the same question, a question that has now been answered in Malaysia by the High Court in their favour.

Saship rely on two grounds in seeking the injunction. One ground is that of duplicity of proceedings. BSNC, it is said, after choosing the Malaysian court as the proper court to decide the question of ownership of the turbine, should not have instituted another action in Ecuador to decide the same question. Only one court should decide the question, and it is the Malaysian court. Two cases were cited in support of the proposition: *Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors* [1996] 5 MLJ 389 and *J.H. Rayner (Mincing Lane) Ltd v. Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312. The other ground is that the question has become *res judicata* with my decision of 21 May 1999.

One of BSNC'S answers to those grounds is that the proceedings in Ecuador are against Energycorp, which is not a party to the proceedings in Malaysia. In my judgment, since the purpose of the proceedings in Ecuador is to obtain a ruling as against Energycorp that BSNC are the owner of the turbine, then the proceedings are virtually proceedings against Saship because, to my mind, BSNC cannot begin to show their title as against Energycorp without first showing their title as against Saship. It would not be right for BSNC not to disclose in the Ecuadorian proceedings the fact that the title to the turbine is claimed by Saship and I should find it hard to conceive of the Ecuadorian court, should it be apprised of that fact, proceeding to adjudicate on BSNC's claim against Energycorp without having Saship made a party and hearing them, and it is especially so now that Saship have established their claim at the High Court level in Malaysia. Whatever claim Energycorp may have over the turbine can only be derived from Saship through Starweaver. I think that is what learned counsel for Saship meant when he said that Energycorp were the privy of Saship. So I think the answer that the proceedings in Ecuador involve a different opponent does not serve BSNC.

Another answer of BSNC is that the proceedings in Ecuador were to obtain an arrest order and the proceedings were properly brought in Ecuador because the turbine was in Ecuador and Energycorp, in whose immediate possession the turbine was, were a company based in Ecuador. It was submitted that the proceedings could not have been instituted in Malaysia.

That would be true if the proceedings were arrest proceedings and if what we are concerned with was only the arrest of the power-barge or the turbine. If it were just a matter of arrest of the turbine to ensure that it remained in Ecuador until the true ownership of the turbine was decided by the Malaysian courts, maybe the matter would not be of great concern to Saship. But according to the letter from BSNC's solicitors in Ecuador, the arrest was to be followed by a determination *inter partes* of the ownership of the turbine. That is what the proceedings in Ecuador will culminate in. My understanding of the letter is that the real purpose of the proceedings in Ecuador was to obtain a determination by the court in Ecuador of the ownership of the turbine. The arrest of the turbine was only to ensure that it remains within Ecuadorian jurisdiction pending the determination of the question. That is confirmed by BSNC in para. 12 of their affidavit in reply, where they say that "the true purport of the order for arrest is that it is but a preventive arrest pending the outcome of the proceedings in the Court of Ecuador, involving Energycorp".

In the final analysis, this is what I conceive the true position as regards BSNC to be. BSNC's concern has been to get physical possession of the turbine. Had the turbine remained within Malaysian jurisdiction, they would have had no reason to seek adjudication in any other country. But the turbine had left Malaysian jurisdiction and, before their application was determined, had passed into the jurisdiction of Ecuador. It would not directly or immediately bring the turbine into their possession even if the Malaysian court were to rule that they were entitled to possession. They had to seek the determination of the court in Ecuador, where the turbine was and is, so that, if the court in Ecuador ruled in their favour, the turbine would be there to be possessed. They had to begin by having the turbine arrested so that it would remain within the jurisdiction of the country where the question was to be decided. *Prima facie*, therefore, I think BSNC had genuine need to bring the proceedings in Ecuador after commencing proceedings in Malaysia.

I turn now to the law on the question of restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction. In *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak & Ors.* [1987] 2 MLJ 397, the situation was one where, in consequence of a death in a helicopter crash in Brunei, a plaintiff commenced proceedings against a defendant both in Brunei and in Texas. At p. 406 H left to B right, the Privy Council said:

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so.

Applying that passage to the present case, it means that the Malaysian court – which obviously, to me, is the natural forum for the determination of the question of ownership of the turbine – should only restrain BSNC from pursuing proceedings in Ecuador if such pursuit would be vexatious or oppressive, taking into account the consideration of injustice to either side as mentioned in that passage.

Learned counsel for Saship submitted that the words "oppressive" and "vexatious" are to be interpreted liberally, and he cited *The Atlantic Star* [1975] 2 All ER 175. That was a case in which the House of Lords considered the question of the right of a foreign plaintiff to sue in an English court. Learned counsel referred to the gist of the House of Lords' decision on the question in para. (i) of the headnote:

> (i) Although a foreign plaintiff was not lightly to be refused the right to sue in an English court if jurisdiction had been properly founded, that right was not absolute and the court had a discretion to grant a stay. That discretion was to be exercised by taking into account (i) any advantage to the plaintiff, and (ii) any disadvantage to the defendant. The advantage to the plaintiff of allowing the suit to proceed had to be substantial, and not merely fanciful; a *bona fide* advantage was a solid weight in the scale, often decisive, but not necessarily so. In particular in Admiralty proceedings in rem the security provided by the arrest of the ship, or the offer of security in lieu, was an advantage which the plaintiff could legitimately seek. On the other hand the disadvantage to the defendant had to be even more substantial to justify a stay of the action; the words 'oppressive' and vexatious' were indicative of the degree and character of the prejudice to the defendant but those words were to be interpreted liberally nor given too restricted or technical an application.

I suppose what learned counsel for Saship meant in saying, in reliance on that paragraph, that those words should be interpreted liberally was that, in this case, the fact that BSNC turned to the jurisdiction of the Ecuadorian court for a decision on the ownership of the turbine after submitting that question to the Malaysian court, thereby causing Saship to have to defend two actions in two jurisdictions and to incur expense and inconvenience as a result, when

a they were in the midst of working out a compromise with creditors, rendered BSNC's action vexatious and oppressive. But I do not think such a one-sided test is intended by *The Atlantic Star*. What is required is a balancing of the advantage to BSNC and the disadvantage to Saship. On the one hand, as I have said, BSNC had genuine need to bring proceedings in Ecuador. It was b advantageous to them to do so. On the other hand, I do not think inconvenience to Saship is a valid consideration. Neither is the fact that the same question will be decided by the courts of two different countries. In support of that, let me quote Lord Reid, at p. 180 h to 181 a, where he was speaking about the authorities that made up the trend of modern authority on c the question. He said:

> They support the general proposition that a foreign plaintiff, who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English courts if he genuinely thinks that that will be to his advantage and is not acting merely vexatiously. Neither d the parties nor the subject-matter of the action need have any connection with England. There may be proceedings on the same subject-matter in a foreign court. It may be a far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English and foreign courts may conflict. But nevertheless the plaintiff has a right to obtain the decision of an English court. He must not act e vexatiously or oppressively or in abuse of the process of the English court, but these terms have been narrowly construed.

In my judgment the Ecuadorian proceedings are not vexatious or oppressive or have not been shown to be so.

f As to the fact that the question of ownership of the turbine has already been decided by the High Court in Malaysia in favour of Saship, I do not think that it is properly to be used to restrain BSNC from continuing with the proceedings in Ecuador. If at all, it is a matter for Saship to bring up for the consideration of the Ecuadorian court.

g I dismiss the application with costs.

---

h

i